Thurston Motor Lines, Inc. *and* Highway and Local Motor Freight Employees, Local 667, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 26-CA-7495, 26-CA-7540, and 26-CA-7937

September 14, 1981

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND ZIMMERMAN

On March 16, 1981, Administrative Law Judge Thomas E. Bracken issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Thurston Motor Lines, Inc., Tupelo, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the said recommneded Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or threaten to discharge any employee for supporting Highway and Local Motor Freight Employees, Local 667, or any other union.

WE WILL NOT coercively interrogate our employees concerning their union activities.

WE WILL NOT threaten that we will close the terminal down if the Union is voted in.

WE WILL NOT threaten our employees with unspecified reprisals because they selected the Union as their bargaining representative.

WE WILL NOT solicit grievances and imply that we will rectify them in order to induce our employees not to support the Union or any other labor organization; provided, however, that nothing herein requires us to vary or abandon any economic benefits or any terms and conditions of employment which we have heretofore established.

WE WILL NOT unilaterally and without notification and/or bargaining with the Union change the hours of work and working conditions of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL offer Donnie Long and Larry W. Johnson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges they previously enjoyed, and WE WILL make them whole for any loss of earnings they may have suffered, with interest.

WE WILL make whole, with interest, any employee who lost wages or other benefits on December 18, 19, and 20, 1978, because of the application of the unilaterally instituted changes in working hours.

THURSTON MOTOR LINES, INC.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In the absence of exceptions, we find it unnecessary to consider the rationale relied upon by the Administrative Law Judge in dismissing the complaint allegations that Respondent had unlawfully discharged truckdriver Brooks L. Steele.

[3] In its exceptions, Respondent contends that the Administrative Law Judge's recommended remedy ordering Respondent to reinstate dockworker Donnie Long should be modified because Long had rejected an earlier offer of reinstatement. The record, however, does not reveal if the alleged earlier offer was an unconditional offer of reinstatement, and, therefore, we find that the issue of Long's reinstatement is a matter best resolved at the compliance stage of this proceeding.

In sustaining the violation found in the discharge of Long, Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), because the Administrative Law Judge correctly found the asserted lawful reason for the discharge to have been a pretext, unsupported by any evidence. In such cases there is only one genuine reason for the discharge, the unlawful one, and the *Wright Line* analysis is of no effective use.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

STATEMENT OF THE CASE

THOMAS E. BRACKEN, Administrative Law Judge: This case was heard by me on April 9, 1979,[1] in Memphis, Tennessee, and on March 24 and 25, 1980, in Tupelo, Mississippi.[2] In substance the complaints aver that Respondent committed acts violating Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act, as amended.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by the General Counsel, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation doing business in the State of Mississippi as an interstate motor freight carrier, has a terminal in Tupelo, Mississippi, and during the past 12 months, purchased and received at this terminal products valued in excess of $50,000 directly from points outside the State of Mississippi. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Company's principal office is in Charlotte, North Carolina, and it operates approximately 41 terminals in a large number of southern and eastern States.[3] The Company employs 2,600 to 3,000 employees throughout its system. Its Tupelo terminal was first opened in an old warehouse in 1973, and, in July 1978,[4] a new terminal was dedicated which employed approximately 10 hourly paid truckdrivers, 2 warehousemen, several office clerical employees, and a terminal manager.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

This case presents the issues of whether Respondent: (1) threatened employees with plant closure if the Union was voted in; (2) coercively interrogated employees about union activity; (3) solicited its employees' grievances and implied that it would rectify them; (4) threatened employees with unspecified reprisals because they selected the Union as their collective-bargaining representative; (5) laid off Donnie S. Long and discharged Larry W. Johnson and Brooks L. Steele because of their union membership and activities; and (6) violated Section 8(a)(5) of the Act by unilaterally changing employees' hours and working conditions without notifying or consulting with the Union.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Prior to Certification*

1. The signing of authorization cards

On August 14, 10 or 11 of Respondent's Tupelo drivers met in a wayside park 2 or 3 miles from the terminal. The record does not indicate who called the meeting, or who secured the union authorization cards that were produced at the meeting. All employees presented signed cards, including Donnie S. Long, Larry W. Johnson, and Brooks Steele, the three alleged discriminatees. On August 24, a representation petition was filed by the Union.[5]

2. Threat of plant closing

Donnie S. Long had been hired as a dockworker by Terminal Manager Lucien Filgo on August 28, 1977. Filgo had been the Tupelo terminal manager since its opening in 1973, and, as admitted by Respondent, was its agent and a supervisor under the Act. In late August, Long was riding with Filgo to a customer's place of business so that Long could load a trailer. Long testified that he did not know how the subject of the Union came up, but after it did:

> He told me that it wouldn't do any good for the employees of Tupelo to sign union cards and vote a union in; that Thurston would shut the Tupelo terminal down and they would bypass it and run the route freight from Memphis to Atlanta and totally do away with the Tupelo terminal, if we voted the union in.

Long's testimony was uncontradicted as Filgo did not testify and I credit it. Filgo was terminated by Respondent sometime in the following October.[6] As testified to by Respondent's president, Franz F. Holscher, he and Filgo remained on friendly terms following his termina-

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[1] On this date Administrative Law Judge Richard L. Denison presided, with the chief issue being argument on a *subpoena duces tecum* filed by counsel for the General Counsel and Respondent's petition to revoke.

[2] The original charge was filed by the Union on November 13, 1978, and a complaint was issued thereon on December 28, 1978. The second charge was filed on December 11, 1978 (amended on December 18, 1978, and on January 10, 1979) and on January 18, 1979, an order consolidating cases and amended Complaint was issued. On July 20, 1979, the third charge was filed and the same was amended on August 10, 1979. On August 16, 1979, a "Motion to Consolidate Cases and Amend Order Consolidating Cases, Amended Complaint and Notice of Hearing" was issued. By order dated August 23, 1979, the motion of the General Counsel was granted. Answers were duly filed by Respondent.

[3] The president of the Company, Franz F. Holscher, testified that it operated in 14 States, whereas Edgar Sims, its safety supervisor, testified it operated in 22 States. It is not necessary to resolve this conflict.

[4] All dates are in 1978 unless otherwise stated.

[5] Official notice is taken of representation proceeding, Case 26-RC-5843. A hearing was conducted thereon on September 14, with a Decision and Direction of Election issuing on September 22 for a unit of employees consisting of all local pickup and delivery drivers, road drivers, checkers, and dockmen employed by Respondent at its Tupelo, Mississippi, location, excluding all office clerical employees and supervisors as defined in the Act. An election was conducted on October 20, in which the Petitioner-Union received a majority of the valid votes, and on October 30 the Union was certified as the collective-bargaining representative of the employees.

[6] G.C. Exh. 17 contains the Company's weekly payroll records for 1978. Filgo signed the payroll records from the first week of the year up to and including the week ending October 7. However, Craig King, a new operations manager, signed the October 14 payroll and the payroll records for the successive weeks of the year.

tion, and Holscher talked to him "quite often." Holscher further testified that he had asked Filgo to be a witness at the hearing and Filgo promised to appear. Holscher could only "surmise" that Filgo was at his home.

No words can put more economic fear in the minds of workers than an employer's threat to close the plant down when made in the context of a union's organization of its employees. *Chemvet Laboratories, Inc.* v. *N.L.R.B.*, 497 F.2d 445 (8th Cir. 1974). Filgo was an agent of the Company, and, accordingly, the threat was attributable to the Company. As the threat was clearly coercive the Company thereby violated Section 8(a)(1) of the Act. *Marsden Electric Company*, 226 NLRB 1097 (1976).

3. Interrogation

Larry W. Johnson was hired by Filgo and started to work on July 19 as a city driver. He had signed a union card at the August 14 meeting at the wayside park. Sometime thereafter, he and another driver, Charles Baldwin, were on the company dock eating lunch. Johnson testified that Filgo came up to them and said, "The boys really messed up; that we didn't need no union down here." Filgo then asked him what he thought about it and Johnson replied that he was making more money than he had ever made before and he was undecided. As far as the record shows this ended the conversation. This testimony was uncontradicted and I credit it. This statement of Filgo, followed by his questioning of the two employees, interferes with the rights of employees to be free of employer intrusion into their protected activities. Hence, I find that it violates Section 8(a)(1) of the Act.

4. The layoff of Donnie Long

a. *The General Counsel's version*

From the time Long had been hired as a dockworker[7] his major duties consisted of unloading freight from trailers and loading freight onto trailers. Most of the time he performed these duties at Respondent's terminal, but occasionally he would be sent to a customer's place of business to perform the same work. At the time he was hired he passed a driver's road test which was given to him by the terminal's senior employee, Johnny Wooten. When no other driver was available he would occasionally drive a tractor, dropping a trailer at a customer's place of business or picking one up.

In June 1978, Long secured a part-time job with another local carrier, Dean Truck Line, as a dockhand and city driver. Dean's terminal was located about 1-1/2 miles from Thurston's. The employees of Dean had been represented by a union for several years, although Long admitted that he was not a member.

Early in the morning of September 5, Long came to work at Respondent's terminal and worked on the dock handling freight. After lunch Filgo drove him to a customer's place of business where he was to load tires on one of Respondent's trailers. At or about 2 p.m., two other of Respondent's employees came to the tire company and relieved him, telling him that Filgo wanted to meet him outside the tire company's gate. Long proceeded to Filgo's car where the terminal manager told him that he was going to have to lay one man off due to a lack of work and, since Long was the youngest dockworker, he was going to be laid off.[8] Long was laid off that day and, on the Company's termination notice, the reason for his termination was typed as "Job Abolished." Long admitted that, before he was laid off, "The freight had slowed down some," but that it had not affected his work, as he was the only full-time breakout man. Long also testified that, the Tupelo to Memphis run was abolished in the week that he was laid off, believing it to be the day he was laid off. Wooten was the regular road driver for the Tupelo to Memphis run, as each night he left Tupelo at 11 p.m., drove to Memphis, a distance of about 96 miles,[9] and returned at 4:30 a.m. The trailers that were loaded and unloaded at Tupelo were destined to and from all 40 terminals in the system.

Frances Oletta Webb had worked for Respondent in Tupelo since August 1977 as an over, short, and damage clerk, while also performing other office duties.[10] Filgo was her supervisor from the time of her hiring until he left in October. Her desk was one of three in the large office, which also contained the billing computer. Adjacent to the large office was a file room and private offices for the terminal manager and the salesman. Webb testified that on the day following Long's termination, or the next day, she was standing "right" inside the file room when Filgo was sitting at the computer talking on the telephone that was on the rate desk. When asked by the General Counsel to tell what she heard, she testified as follows:

> A. I heard him say "I got rid of the troublemaker."
>
> There was a pause, and he says, "Donnie Long."
>
> Then in a few minutes he said, "Well, he was working part-time for Thurston—I mean for Dean Truck Line," and said, "They're union and they were putting this mess in his head" or "they were putting him up to this." I heard that.
>
> Q. Do you know who Mr. Filgo was talking to?
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> A. The only way I can tell you is when he got off the telephone he turned to me, and he said, "Jim said—something. I said, "Jim who," and he said "Jim Tyner."[11]

b. *Respondent's defense*

Wooten testified that he was the road driver for about a year and a half on the Tupelo to Memphis run. During this period the freight fluctuated quite a bit with it being light most of the time. He did not know that the run was

[7] Dockworkers were also referred to as warehousemen.

[8] There were four employees with less seniority than Long, but all four were city drivers. Respondent's stated policy was to retain drivers over warehousemen in the event of a layoff.

[9] "Rand McNally Road Atlas" (1980 ed.).

[10] Webb was an impressive witness; her testimony was uncontradicted, and I credit it. She was also still employed by Respondent, further supporting her credibility.

[11] Tyner was identified by Holscher as being the assistant to the vice president of operations, Brantly, with an office in Charlotte.

going to be abolished before the decision was made to do so. He agreed that after the run was abolished team road drivers from other terminals delivered freight to Tupelo and to Memphis.

President Holscher testified that Long was not laid off at his instructions, but at the instruction of the operations department. He further testified that he knew Long was terminated "because of [a] lack of work because of the cutoff of a Memphis to Tupelo run."

c. *Conclusion*

In applying the precepts of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), it is evident that the General Counsel has made a *prima facie* showing sufficient to support the inference that Long's union activity was a motivating factor in his termination.

As shown by Webb's uncontradicted and credited testimony, Terminal Manager Filgo clearly reported to his next in command, Assistant Operations Manager Tyner, why he terminated Long. He terminated Long because he was a "troublemaker,"[12] as he had been working part time for another Tupelo-based carrier, Dean Truck Lines, whose employees were represented by a union, and these union employees at Dean, Filgo believed, were using Long as their activist at Thurston's terminal. There is nothing in the record to show that Long was the union activist in the Thurston campaign and Filgo's guess that Long was the spearhead was probably incorrect. However, Filgo believed this to be so and terminated Long because of this incorrect assumption of such union activity.

Respondent's defense for Long's termination as expressed by Holscher was for a very specific reason: There was a lack of work due to the cutoff of the Memphis to Tupelo run. However, the Company presented absolutely no records to support its contention that the freight hauled between these two points was light or that it was decreasing.

It also must be borne in mind that Memphis was just one of the 40 terminals to which the Tupelo terminal shipped freight and there is nothing in the record to show that it was a major receiver of freight outbound from Tupelo. In fact, the record shows that Wooten pulled only one trailer up to Memphis each night, and then pulled only one back. Many more trailers than one were loaded each day out of the Tupelo terminal. Respondent does not contend that freight tonnage from Tupelo to Charlotte, or Atlanta, or Richmond, or any one of the many other terminals was light, nor does it offer any documentation to support such a theory.

The only document in the record that can reflect any light on such shipments was General Counsel's Exhibit 19, which was a summary sheet of outbound and inbound revenue for the Tupelo terminal for the years of 1974 through early 1980. This summary was prepared at Holscher's request in the ordinary course of his executive duties, not for this hearing. It has two halves, the top half setting forth outbound revenue and the bottom half inbound revenue.[13] It shows totals for the years of 1974 through 1979. Each year, as explained by Holscher, is divided into thirteen 20-day periods.

An examination of these yearly revenue totals shows that the Tupelo terminal had a healthy growth in its annual revenue rising from $436,774 in 1974 to $1,002,959 in 1978, representing a percentage growth of 5.80 in 1975, 39.85 in 1976, 19.43 in 1977, and 29.95 in 1978. This is not to say that there was a percentage increase in each and every period. There were in each year, including 1978, periods in which the revenue decreased, as well as increased. However, there is nothing in the record to show that any employee was ever laid off because of a decrease in revenue. The only testimony on the issue of any other employees being laid off prior to Long was that of city driver Dan Davis. Davis testified that Long was the only employee he knew of who had been laid off since Davis was hired in September 1977. This was uncontradicted.

A review of the outbound revenue periods for 1978 also shows that there were decreases in some periods, as well as increases. In the second period, there was a decrease of $9,024 from the revenue produced in the first period. There was also a decrease of $14,457 in the sixth period, and a decrease of $6,782 in the seventh period. However, the record fails to show that any employee was laid off in the period following these downturns in revenue. The eighth period, which ended on August 12, showed an increase in revenue of $8,970 over the seventh period. Long was laid off on September 5, a Tuesday, which was in the last week of the ninth period, and necessarily before the revenue could be computed for the ninth period, as that period would not end until September 9. Thus, the only relevant record of Respondent produced at the hearing shows that at the time Long was laid off the Tupelo terminal had had an increase in revenue of $8,970 over the prior period.

An examination of General Counsel's Exhibit 17, the weekly payroll sheets for the Tupelo terminal, also indicates that in the weeks prior to Long's layoff there was no slackening of freight handled by the terminal's employees. The five payroll periods prior to Long's termination show that the total number of hours worked by Respondent's hourly paid employees, including office employees, were as follows:

8/5/78	532.0
8/12/78	583.9
8/19/78	595.2
8/26/78	602.2
9/2/78	606.1

Thus, these hours of service would indicate that there was no slackening of work at the Tupelo terminal prior to Long's layoff on September 5, but that the workload was increasing as the employees' hours of service steadily climbed for 5 consecutive weeks.

[12] The term "troublemaker" has an established meaning in the annals of labor relations as a term applied by employers to individuals who are attempting to enlist other employees into engaging in union or concerted activity. *Garrison Valley Center, Inc.*, 246 NLRB 700 (1979); *Passaic Crushed Stone Co., Inc.*, 206 NLRB 81 (1973).

[13] Holscher contended that the important factor in determining a terminal's profitability to the Company was its outbound freight, as only outbound freight represented revenue generated by that terminal.

From the foregoing I conclude that Respondent's stated reason for Long's discharge was a pretext. Respondent had union animus as shown by the terminal manager's threat that Respondent would close the terminal down if a union was voted in. Also, Respondent had a long history of union hostility and violations of the Act as set forth in six prior cases.[14] After the Union filed its petition for an election on August 24, Respondent had full knowledge that the Union was seeking to represent its employees at Tupelo. When Filgo looked around for the union "troublemaker" he selected Long because he was concurrently working part time for a nearby union truckline. The terminal manager then precipitately terminated Long, a good employee as admitted by Holscher, telling him it was for a lack of work. Holscher testified that it was because of the abolition of the Tupelo to Memphis run, yet Wooten, who had been making that run for a year and a half, was not even told beforehand that the run was going to be abolished.

No records were produced by the Company to show that freight was lacking in the Tupelo to Memphis run, or that freight was decreasing in Tupelo's relationship with the other 40 terminals. The only company records reflecting on the increase or decrease of tonnage at Tupelo showed that prior to Long's termination the terminal had maintained an overall continuing increase in producing outbound revenue, and that even in the work period prior to Long's discharge there had been a healthy increase in revenue. In keeping with this increase in revenue, which shows that there was no slackening of work, is the fact that the hours of work of the hourly paid employees constantly increased in each of the 5 weeks prior to Long's discharge. Accordingly, on all the evidence of record, I find that Long was discharged on September 5 because of his being selected as the union activist, and that his discharge was to nip the campaign in the bud. The stated reason of lack of work was a pretext to conceal antiunion motivation for his discharge. Such discharge violated Section 8(a)(3) and (1) of the Act.

5. Solicitation of grievances

Paragraph 8 of the amended complaint alleges: "Respondent by its supervisor and agent, Franz Holscher, on or about September 27, 1978, at its Tupelo, Mississippi, location, solicited its employees' grievances and implied that it would rectify them." Three employees testified in support of this allegation, Larry Johnson, Brooks Steele, and Dan Davis. Johnson testified that some of the drivers had called Holscher or "somebody" in Charlotte and stated that they had a "bunch of grievances," and if these could be worked out maybe the Union could be kept out. Holscher did appear at the terminal in the evening sometime before the election, unannounced, and conducted a meeting in the terminal office after first sending Filgo home. This was the first time Holscher had met with the employees. He told them he understood they had some problems and then asked the men what their grievances were. Brooks Steele told him to get rid of Filgo and give the employees a new terminal manager. Holscher replied that he could not do that, but that he might bring in another man and put him between Filgo and the employees.

Steele and Davis testified that Holscher told the employees he had heard they were having problems, wanted to know what they were, and had come to help straighten them out. All employees said they were having trouble with Filgo. Thereafter, an open discussion took place. Some employees, including Davis, complained about the condition of the terminal's parking lot, that they could not use the forklift truck as it was broken down, and that Filgo chewed out the employees in front of other employees. Holscher then told the employees that he was not aware of these matters, and they were not something he could straighten out over night, but he would try to help them.

According to Holscher, he came to the terminal in September at the request of some drivers who had called him long distance. They told him that they had some "problems," and they thought if he came to Tupelo the problems could be worked out. At the meeting Holscher asked the employees what they wanted to talk about. When one driver said, "Look, we don't want a union here," Holscher told him, "Well, that's not what I'm here for. I'm here to talk about problems." Various subjects were then brought up with virtually every man present discussing some problem in the 2- to 2-1/2-hour meeting. Among the subjects he recalled being brought up were the parking lot and a manually operated oil pump. One of the employees spoke up and said, "Well, if you would get that son-of-a-bitch in the corner office off his back, things would be different." Holscher then told the employees that he had not come down to fire Filgo, and that he had come to talk about problems. Holscher admitted that he did subsequently fire Filgo, although the record does not show the date. He also admitted that he transferred Craig King to Tupelo as the operations manager prior to the election.[15]

The record is clear that prior to the election Holscher was asked by some employees to come to Tupelo to meet with them to try to work out some problems, something he had never done before. The president did come, excluded the terminal manager from the meeting, and admittedly told them that he was there to talk about problems. He then engaged in a 2- or 2-1/2-hour "dialogue" with these employees. While Holscher carefully referred to the subjects discussed at the meeting as problems they were also grievances by any standard of labor relations.[16] I credit Davis' testimony that Holscher said he would try to help them straighten out these matters, as he was an impressive witness and had the best recall of that meeting. Even assuming that Holscher did not say he

[14] *Thurston Motor Lines, Inc.*, 149 NLRB 1368 (1964); 159 NLRB 1265 (1966); 166 NLRB 862 (1976); 168 NLRB 428 (1967); 180 NLRB 944 (1970), enfd. as modified 439 F.2d 1202 (6th Cir. 1971); 237 NLRB 498 (1978).

[15] As previously noted, G.C. Exh. 7 shows that Filgo never signed the weekly payroll sheets after October 7, and that King commenced signing the weekly payroll sheets on October 14 and thereafter.

[16] A grievance is "[a]ny complaint by an employee or by a union . . . concerning any aspect of the employment relationship." "Roberts' Dictionary of Industrial Relations," The Bureau of National Affairs, Inc. (rev. ed 1971).

would adjust their complaints, certainly they had a logical right to believe that this top executive of the Company, who had come a distance of 580 miles to hear their complaints, and who had listened sympathetically to them for over 2 hours at a meeting he called, would remedy the bulk of their complaints. As the Board said in *Reliance Electric Company*, 191 NLRB 44, 46 (1971):

> Where, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.

Holscher did shortly thereafter bring in King as a buffer between the men and the terminal manager, and he did grant their chief complaint, that of firing Filgo. He admitted on cross-examination that the complaints lodged by the employees against Filgo were "a contributing factor" in discharging Filgo.

In view of the above, I find that Respondent coerced employees in violation of Section 8(a)(1) of the Act by its solicitation of grievances and its implied promise to remedy them. *Raley's Inc.*, 236 NLRB 971 (1978).

6. Threats of reprisal

Paragraph 9 of the amended complaints recites: "On or about October 20, 1978, Respondent, acting through Franz Holscher, at its Tupelo, Mississippi, location, threatened its employees with unspecified reprisals because they selected the Union as their collective-bargaining representative."

On October 19, the day before the election, Holscher was at the Tupelo terminal. While there he told the employees that he was going to have dinner at the Sheraton and if any employee would like to join him at dinner he would be happy to have him as his guest. That evening all of the drivers, except Wooten, joined him at dinner, and as Holscher described it, "[w]e just had a good time." The election was not discussed, but Holscher admittedly told them to vote their conscience as to whatever was best for them.

The representation election was conducted on the following morning. After the ballots had been counted the Board agent announced to the employees who had assembled on the dock that the Union had received a majority of the valid votes. Steele testified that Holscher came out on the dock and said to the employees, "You all lied to me. Everyone of you have lied to me" and then said something like, "You all will take it as the chips fall." He then turned and left, and Steele testified, "He was mad." Davis testified that Holscher was red faced and "said we'd lied to him and let him down." All Johnson could recall was that Holscher said, "Let the chips fall where they will."

Holscher admitted that he was disappointed after the election results were announced. When asked if he had some conversation after the votes were counted, he testified as follows:

> A. Yes, I did. I was out on the dock and all the fellows were standing around.
>
> I have to be perfectly honest, I was disappointed. I was not mad any more than I'm mad right now because I was disappointed because the fellows had asked me down in good faith long before the union election took place to air their problems. I think they were referred to as grievances. I call them problems.Then when I came down and did the things I thought I could do, and then they turn around and voted for the union, I would be untruthful to say that I was not disappointed. I was disappointed.
>
> Q. Did you call them liars?
>
> A. No sir, I didn't call them liars.
>
> Q. What did you say?
>
> A. I don't recall the exact words. I think I said this, "I was disappoint[ed] with the outcome. You fellows led me to believe that this was not what you wanted, but now you made the decision. You'll just have to let the chips fall where they will."

I find that in the context in which it was made, "You'll just have to let the chips fall where they will" Holscher's statement was a thinly veiled threat of reprisal against the assembled employees for their having voted for the Union. Holscher was obviously angry as he believed that the employees had betrayed him because in his opinion they had led him to believe they did not want a union. The clear implication of the president's words was that the employees would pay for their betrayal for having selected the Union. Such a threat violated Section 8(a)(1) of the Act.

B. *Credibility*

At several intervals in the case there were testimonial conflicts between the testimony of the General Counsel's witnesses and Respondent's witnesses. The General Counsel's bargaining unit witnesses, with the exception of Brooks Steele,[17] impressed me as sincere, young, minimally educated truckdrivers, telling the truth as best they could remember it, and I credit them generally. Also, they withstood long and searching cross-examination, while the hearing was conducted under the rule of exclusion of witnesses. Much testimony was produced on the subject of whether drivers received certain documents and took certain tests when hired by the Company. While these are peripheral matters they do bear on credibility and will be briefly reviewed.

It was the Company's position that when a driver was hired at Tupelo, he received four different items for which he would sign a printed form receipt, as set forth below:

Terminal
Date

[17] Steele's credibility is reviewed in sec. IV, D.1, below.

I hereby acknowledge receipt of the following:

1. Rules Governing Employment With Thurston Motor Lines, Inc.
2. Instructions Applicable to Drivers of Motor Vehicles
3. I.C.C. Safety Rules and Regulations.
4. Accident Report Kit.

I agree to familiarize myself with all of the rules and regulations and to abide by them. I further understand that my failure to learn these rules and to abide by them will result in dismissal from the Company.

Signed
Witness

Copies of this form, Respondent's Exhibits 4, 9, and 13 were admittedly signed by Johnson, Davis, and Westmoreland. However, Johnson and Westmoreland denied receiving items 1, 3, and 4. As to item 2, Johnson and Westmoreland stated they merely received some kind of "dock" rules concerning such things as drinking and gambling on the premises, but not driving rules. Davis testified that he did not remember receiving items 1 and 2, but stated flatly he did not receive items 3 and 4. Item 3 was in evidence as General Counsel's Exhibit 5. It was am imposing looking red booklet, three-fourths of an inch thick by 4 by 6 inches captioned "Federal Motor Carrier Safety Regulations." When shown to Davis, he testified that he first saw one 2 weeks prior to the date of his testimony when Terminal Manager Crump gave him one. This was uncontradicted by Crump.

Respondent's counsel strenuously cross-examined these witnesses as to why they would sign a receipt for material that they did not receive. They all stated that they signed whatever documents were placed before them when they were hired, as they were told that those signed documents had to be sent to the main office in Charlotte. Office employee Brenda Ellott's name appears to be signed on Johnson's receipt as a witness, and office employee Thomas Jarrell's name is contained on Davis' and Westmoreland's receipts as a witness. Neither of these employees testified. It is also significant that Respondent did not produce at the hearing any of the three other documents which it argues the drivers received. I credit these drivers that they did not receive the documents for which they signed. It is an indisputable fact of American life that many Americans routinely sign whatever documents are placed before them, without reading them, and on many occasions of importance to them, such as when buying a house or a car, making a loan, or applying for a job.[18]

Respondent's witnesses did not impress me as persons in whose testimony I could have confidence as to its accuracy and reliability. Rather, I received the strong impression that they were advocates trying to furnish answers that helped their cause, rather than trying to state the facts as they actually remembered them. An example of such evasive testimony by Holscher is shown below as he was being questioned by the General Counsel pursuant to Rule 611(c), of the Federal Rules of Evidence about Respondent's policy regarding unions:

Q. The Company does have a policy of fighting to keep the Union out of their terminals, doesn't it?

A. Does the Company have a policy? You're talking about a formal written policy?

Q. I don't mean written, but a formal policy?

A. I don't know of any formal policy to keep a Union out.

Q. Your Terminal Managers do have instructions to notify headquarters as soon as they have any knowledge of a Union campaign?

A. Do they have written instructions? I don't recall. I'm sure they do not have written instructions.

Q. They have standing instructions to notify headquarters as soon as they find out about a union campaign, don't they?

A. I would think if they were good managers, if they had a campaign, they would let us know.

Q. They have instructions from headquarters to do that?

A. Well, maybe you know that. I don't.

Q. Well, I'm asking you. Don't they have instructions along those lines?

A. In writing?

Q. Any kind?

A. Now, wait a minute. Before you tried to pin me down on written instructions on speed. Now, you want me to be lose on this sort of thing, and I'm not going to do it.

Q. I want to know don't your Terminal Managers have standing instructions to report to their headquarters at the first knowledge that they have of the employee's involvement with the Union?

A. I'm saying to you this, and I'll answer this way, that if they hear about it, and they do have problems, they would notify me.

Q. Do you know whether they have standing instructions from [the] home office to so notify you?

A. I think he'd be foolish if he didn't notify me.[19]

An example of Safety Supervisor Edgar Sims' unreliability is his answer when questioned about when he first learned of the employees' union activity at Tupelo: "I probably heard it over a period of time, but due to the fact that we don't get involved in that, we hear very little thing[s], if anything, with other than what we do in our job." Sims' attempt to convey that he heard very

[18] There was also voluminous testimony as to whether employees took a drivers test and a written test when they were hired. They did sign a certification form stating that they took the tests. It is not necessary for the purposes of this case to resolve these matters.

[19] In *Thurston Motor Lines, Inc.*, 237 NLRB 498, 500 (1978), the Board found Respondent's general policy toward unions to be as follows:

D. J. Thurston, Jr., Respondent's president and chief executive officer, has seen his Company through "many, many" organizational campaigns since 1932. Admittedly, it is Company policy "to fight quite vigorously to keep [its] terminals from being organized." According to his testimony, the terminal managers have standing instructions to notify headquarters as soon as union campaign arises. Thurston was still the owner of Respondent at all times material hereto.

little about company activities outside the safety department is in stark contrast to Holscher's position as to how company news travels about the truckline. When the president was asked how he found out about a certain matter at Tupelo, the hiring of part-time dockworkers, Holscher replied that he did not know how he found out about it, but that "[t]he trucking industry is the world's greatest rumor vine." As he stated, a road driver could hear something in Tupelo, and the incident would be in New York by noon. Certainly Sims, with his safety supervisors patrolling the vast system of Respondent day and night, was privy to Respondent's rumor vine, and learned of many matters concerning Respondent's business other than safety matters.

C. *The Discharge of Larry W. Johnson*

1. The General Counsel's version

Johnson was hired on July 19 as a city driver by Filgo. During his first 2 weeks, he worked on the dock loading trailers. Thereafter, he drove tractor-trailers picking up and delivering freight, although he continued to work on the dock for about 2 hours each day like the other drivers did.

Johnson testified that on the afternoon of November 7 he had picked up freight at the town of Belmont, and was driving the tractor-trailer back to the terminal on a hilly, crooked road. He noticed in his mirror several times that a car was "tailing" him. He pulled in on a weigh station 3 or 4 miles later, was weighed on the scales, and then pulled on the parking lot of the adjoining dairy bar to get a sandwich. The tailing car drove by, turned around, and came back. Johnson saw that it was Edgar Sims, Respondent's safety supervisor.[20] Sims checked Johnson's driver's license and then gave the truck a routine equipment check. He asked Johnson if his speedometer worked, and Johnson stated that it did. Johnson asked Sims if he had done anything wrong and Sims told him that he had been speeding a little bit down hills. During the inspection Johnson told Sims that there was some talk that Respondent might reroute the freight out of Tupelo because the employees had voted the Union in, and asked him if he thought they would ever get a contract. Sims replied that he was not concerned with the Union, and that his business was safety.

Johnson returned to the terminal and made a short run to another customer. Upon arriving at the terminal at or about 5 p.m., he told Craig King, the new operations manager, that Sims had checked him and that he was going about 60 to 62 miles per hour when he dropped off hills. King then told Johnson that he might get a letter of reprimand or that he might hear nothing about it.

On the next morning, Johnson reported to the job and drove his tractor-trailer doing routine pickup and delivery work until about 4 p.m. when he was called to the office. Here he met King, who told him that it was an embarrassing situation as he had only been there about 30 days and had received a call from Thurston, Respondent's owner. King then told Johnson that he had two choices, he could resign and nothing would go against his record, or they would terminate him, as they had him on radar, and he had been charged with going 67 miles per hour. King then told Johnson if an employee was caught driving over 65 miles per hour he was automatically terminated. Johnson told King that all of the drivers speed and King replied that sometimes they get suspended for a week. Johnson replied that he thought it was unfair for the Company to fire him the first time he was caught speeding, and King replied, "I don't ask Mr. Thurston questions."

Johnson testified that nothing had ever been said to him about Respondent's speeding policy, and that to his knowledge no Thurston driver had ever been disciplined for speeding prior to his termination. His termination notice, dated November 8, 1978, stated under comments: "Terminated, as Company policy states speeding in excess of 65 mph will be grounds for termination."

2. Respondent's defense

Edgar Sims had been the safety supervisor of Respondent for over 11 years, and had five employees in his safety department. Three safety men patrolled on a daily basis with one patrolman working out of Nashville, and one out of Wilson, North Carolina. Sims testified that no one tells the safety patrolmen where to go, as they select their own area to patrol. He testified that he and other safety men had patrolled the Tupelo area in past years, but did not recall when, or if, a Tupelo terminal driver had ever been stopped before the election. When a driver is stopped on the road by a safety man, an observation report is made out for the safety department whether the driver is speeding or not. No observation reports were produced by Respondent to show that any Tupelo drivers had ever been observed prior to the election. Sims denied being in the Tupelo area because the employees had voted for union representation, stating that he was merely going from Muscle Shoals, Alabama, to Tupelo. On cross-examination Sims reluctantly admitted that he "probably knew about the employees' union involvement at the Tupelo terminal prior to the election."

Sims testified that on November 11 he had stopped to get a coke at Belmont when one of Respondent's trucks came by at what he observed to be a fast rate of speed. He then gave pursuit along the two-lane road, that was crooked and hilly, putting the unit under observation. Sims determined that the unit was running at 67 miles per hour as it would come down off hills. He testified that he checked the unit's speed by the speedometer on his patrol car, which is calibrated. At the time he had a TDS radar machine on his car, but unexplainably did not use it. As the driver pulled off the scales, Sims pulled in front of the tractor-trailer.

Sims testified that he did not know who the driver was, and that "out of [the] blue sky" the driver said to him that they had to get rid of the Union. Sims replied

[20] Johnson had seen Sims at the terminal one time about 3 weeks before this meeting. The only other driver that Johnson had ever heard of being checked by Sims was Dan Davis. Davis told Johnson that Sims had stopped him on the road a week or 10 days prior to this encounter of Johnson with Sims. No observation report was placed in the record as to Sims' observation of Davis.

that he was in the safety department and had nothing to do with such matters. Sims then reviewed his license, inspected the truck, and filled out an observation report. He then told Johnson he could return to the terminal. Nothing was said about speeding except Sims said, "You were getting it done down through that crooked road."[21] Sims then followed Johnson to the terminal where, "I reported it to the terminal manager and gave him a copy of the observation report and requested under Respondent's rules that the driver be terminated." Sims later testified that he instructed Crump to discharge Johnson.

Sims contended that the Company had a policy of automatic termination of a driver who at any time was caught driving equipment 65 miles per hour or over, and that this policy had been in effect during the 11 years he had worked for Respondent. He admitted that the safety department does not notify the drivers directly about the over 65 speeding policy, but testified that he knew that Tupelo employees had been informed of it at safety meetings "because I attended the meetings." When pressed, he admitted he attended one meeting at Tupelo, and this meeting, he agreed, was held on February 15, 1979.

On cross-examination Sims admitted that the only printed rule that Respondent had on speeding was contained on page 10 of General Counsel's Exhibit 2, "Driver Rules." This document, dated August 1971, contained 16 pages of specific rules on driving, care of equipment, and safety. The only rule on speeding was contained in item 3, page 10, entitled "Speed Limit" which reads as follows:

> Speed Limit: At no time will a vehicle be operated at a speed that will not permit the driver to stop within the distance of his clear vision. State and local speed laws must be obeyed. A driver must not drive faster than fifty-five (55) miles per hour. This speed must be reduced in keeping with conditions on slippery roads, in fog and rain, when approaching a curve, intersection, school, school bus, towns and other traffic conditions. The practice of letting a unit pick up speed on a downgrade in order to make the next hill, with a minimum of gear shifting is strictly forbidden. Speed limits apply when you are running for a hill just as they do on level ground [G.C. Exh. 2].

During the course of Respondent's direct examination of Sims, Respondent's counsel had him identify a stapled together packet of observation reports. These reports, made by various safety supervisors of the Company, were received into evidence as Respondent's Exhibit 20. Sims testified that he collected these documents at counsel's request from the individual driver's file, and that he knew that each of the individuals named on the documents had been fired for speeding in 1978, 1979, and the first 2 months of 1980.

An examination of Respondent's Exhibit 20 discloses that there are 25 observation reports in the packet. However, these are not observation reports on all 25 individual drivers, but only 19, as 6 of the reports contained therein are photocopies of some of the original ink-written reports. An original and a duplicate were submitted for employees Earl Black, Charles Eller, John C. Ellis, and Bob Herrington, and an original and two duplicates were submitted for Preston Davis. An examination of the 19 valid reports show that in 1978 4 drivers were written up, 1 each in May, June, August, and November (Johnson). In 1979, 13 drivers were written up, with 3 in July, the first of whom was Tupelo driver Brooks Steele, 3 in August, 6 in September, and 1 in October. In 1980, one driver was observed in January and one in February. Of these reports 3 had been completed by Safety Patrolman Paul Jump, 13 by W. C. Washam, and 3 by Sims. Each of these reports listed the speed of the vehicle as 65 miles per hour or greater. Sims further testified that there were "separation" notices for each discharged employee in the ex-employee's file in Charlotte. However, no termination notices were produced by Respondent for any drivers other than those of Johnson and Steele.

According to Holscher, in the 11 years he had been with the Company, it had always had a 55-mile-an-hour speed limit, and, "[W]e have always had in excess of 65 is a dischargeable offense." Holscher at first testified that the Company had Drivers' Rules which include the Company's policy on speeding. When shown General Counsel's Exhibit 2, Driver Rules, Holscher pointed to the sentence, "A driver must not drive faster than fifty-five (55) miles per hour" as the rule on speeding. When pressed if the Company had any other written policy on speeding, Holscher pointed to some general clauses such as "a driver is supposed to drive in a safe manner at all times, and if in doubt, play safe." However, he was unable to point to or produce anything in writing as to the 65-mile-per-hour policy and finally admitted that he was unable to do so.

The president did testify that the employees are told of the company policy on speeding "all the time" by safety department employees who conduct safety meetings for drivers at the various terminals. Holscher admitted that he had never been to a safety meeting in Tupelo and that he had no personal knowledge that Respondent's Tupelo employees ever received instructions or were informed of Respondent's policy for drivers who exceed 65 miles per hour.

As to Sims, Holscher testified that he sets his own schedule as to what areas he will patrol, and goes to wherever he thinks Respondent is having the greatest number of problems. He admitted that he had no knowledge of any problems in the Tupelo area.

3. Conclusion

It is well established that an employer may terminate an employee for any reason, good, bad, or indifferent, without running afoul of the Act, provided it is not motivated by unlawful considerations. In the instant case, I find that Respondent was motivated by unlawful considerations and that the discharge was pretextual.

While it is true that Respondent did not have specific knowledge that Johnson had engaged in union activities

[21] Sims testified that it was company policy not to tell a driver out on the road how fast he was charged with driving so as to avoid arguments on the road.

prior to his discharge, Respondent did know that on October 20 a majority of its employees had voted for the Union and against the Company. President Holscher was upset with the Tupelo employees, as he believed that they had betrayed him, and he ominously warned them that they would have to let the chips fall where they would. So, 10 days later, for the first known time in the Tupelo terminal's history, a driver, Davis, was stopped on the road, and checked by Respondent's safety supervisor. About 10 days after that stoppage, the safety supervisor again appeared in the Tupelo area, saw a Thurston truck, and gave pursuit. Although Holscher testified that Sims would go where he thought Respondent was having the greatest number of problems, Sims never claimed that there were any problems with Tupelo drivers, nor stated why he was in the Tupelo area when he stopped Davis or Johnson. Respondent did have a problem, and the problem was that the employees had voted for the Union as their collective-bargaining representative, and Respondent set out to undermine that bargaining agent.

The record is clear that Johnson and the other Tupelo drivers, as of November 7, had no knowledge of Respondent's alleged rule or policy that employees were automatically terminated if caught driving in excess of 65 miles per hour. Thus, when Johnson returned to the terminal and talked to King about the incident, he had no reason to know that he had committed a dischargable offense. Sims had not told him so out on the road, and King did not tell him so, merely telling him that he might get a letter of reprimand or might not hear anything about it at all.

If Sims' testimony was correct that such speeding means automatic termination, Johnson would have been terminated that evening by the manager. However, he was not terminated or suspended and the next day took his truck out and did his regular day's work as a pickup and delivery driver. It was on the second evening after being stopped by Sims that he was told by King that he had received a call from Thurston, Respondent's owner. Thurston's directive to King was to offer Johnson a "Hobson's" choice—that he resign or he would be terminated. The testimony of Johnson as to Thurston's directing his termination was undenied, and shows that Johnson was not discharged at Sims' instructions on November 7, but that he was discharged by the order of Respondent's owner himself on November 8.

Respondent's failure to produce any records to show that it had a rule requiring termination for exceeding 65 miles per hour is accentuated by the fact that it did have two written rules that required the immediate termination of a driver. On page 1 of its Driver Rules, it states:

> (a) Three chargeable accidents against any driver within a period of twelve months shall result in immediate termination of his employment with Thurston.
>
> (b) Failure of any driver to report an accident shall result in immediate termination of his employment with Thurston.

Certainly, if Respondent had a 65-mile-per-hour termination rule, it would have set it forth in some written form so that all employees would have been forewarned, just as it forewarned them of discharge for having three chargeable accidents and for the failure to report an accident.

As previously stated, I do not find that the 25 observation reports, put into evidence as Respondent's Exhibit 20, establish that 19 drivers were terminated for exceeding 65 miles per hour in 1978, 1979, and 1980. The most these reports establish is that observations were made of these drivers, not that they were terminated. Also, it is informative that only three reports were made in the first 10 months of 1978 before the Union won the election and before Johnson was written up.

I am convinced and I find on the entire record, and for the reasons set forth above, that Respondent's asserted reason for Johnson's discharge on November 8 was advanced as pure pretext to mask an unlawful motivation, and that the inference can fairly be drawn that Johnson was discharged because of the employees' election of the Union as their collective-bargaining representative. Such discharge violated Section 8(a)(3) and (1) of the Act. *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966); *American Tara Corporation, American Carbon Paper Division*, 242 NLRB 1230 (1979); *Stafford Trucking Inc.*, 154 NLRB 1309 (1965).

D. *The Discharge of Brooks L. Steele*

1. The General Counsel's version

Steele had been hired on March 23, 1976, by Terminal Manager Filgo as a city driver. He testified that he saw a company safety man at the terminal on three separate occasions. The first time was in 1976 at the old terminal when he saw a safety man inspecting, and red tagging, trucks. The second time was shortly after the new terminal opened when he saw Sims for the first time as Sims was standing on the dock. The third occasion was on February 15, 1979, at a safety meeting when Sims and another safety man came to the terminal, showed a safety film, and discussed some aspects of safe driving such as getting in and out of a truck without slipping and falling. Steele testified that he could not recall Sims saying anything about speeding at that meeting and that up to that time he had never seen a Thurston safety patrolman out on the road. He was then further questioned by the General Counsel:

> Q. Did you have any knowledge as to whether they patrolled the road or not?
>
> A. No, sir, we was never told about it. We was never warned about them being on the road or anything.
>
> Q. Did you ever find out about safety patrolmen being on the road?
>
> A. Not until Mr. Sims pulled me over that day.
>
> Q. Did you know anything about it before he pulled you over?
>
> A. No, sir, I didn't.
>
> Q. Had you ever heard anything about it?

A. No, sir. I had never heard of him ever pulling a road driver over.

Q. Until when?

A. Until he pulled me over. Until after I got back into the terminal that day and the next day.

Q. You don't know whether he had pulled any other drivers over or not?

A. No, sir.

On cross-examination, Steele again denied that he had ever heard that a safety man had the authority to stop a driver on the road. However, on being shown his pre-hearing affidavit, dated December 18, he agreed that at one time he had asked Filgo if a safety man could stop a driver, and Filgo said he could. Steele also admitted that he knew months before he was fired that, if a driver was caught speeding over 65 miles per hour, he would be fired. He knew this because the firing of Johnson for exceeding 65 "was all over the terminal."

Steele's insistence on direct that he had no knowledge that Thurston safety men patrolled the highways and that he only learned of it when Sims pulled him over on July 17, 1979, is contradicted by his admission on cross-examination that Filgo had previously told him that safety patrolmen had such rights. Also, his statement that he did not know that Sims ever pulled any other driver over is contradicted by his testimony that when Johnson was fired his firing was a big topic of conversation for all employees at the terminal. It is incredible to believe that in the discussion of Johnson's discharge in November by all the drivers Steele would not have learned that Sims had pulled Johnson over for speeding. Because of the numerous contradictions in Steele's testimony, I do not find him to be a credible witness on contested evidence.

On July 17, 1979, Steele was returning from his regular daily run to Corinth, Mississippi, a distance of 50 to 55 miles from Tupelo. He testified that it was around 3 p.m. and traffic on the two-lane highway was heavy due to the fact that employees in two or three factories in Corinth were changing shifts. South of Corinth, Steele stopped at a roadside park, used the restroom, and did some paperwork for about 10 minutes. He testified that he was in no hurry because he had from 3 to 5:30 p.m. to drive the 55 miles to the Tupelo terminal.

Steele then got in his truck and drove about 4 or 5 miles when he noticed in his mirror that there was a car behind him with a "speed gun" on the dash board. When he saw the speed gun, thinking it was a highway patrol car, he checked his speedometer and saw that he was going 50 miles per hour. By that time Steele was going up hill and the trailing car pulled around his unit and flashed a sign that read, "Thurston Safety Patrol." Steele pulled over and Sims and a passenger told Steele they were going to give him a routine truck check. Upon completion of the check, Sims told Steele that he would probably see him the next morning. Steele then drove his unit to the terminal, told Crump and King about the incident, and punched out at or about 6 p.m.

On the following morning, Steele punched in at 8:30 a.m., loaded his truck, and saw Sims and the other safety man drive into the terminal and stop at the gas pump. Crump went over and talked to Sims as Steele gave his truck its daily checkup. Steele then carried his daily report into the office and the terminal manager and the safety men got in a car and left the terminal.

Steele made his regular run all day, returned to the terminal, and unloaded his truck. On punching his timecard, Crump told Steele that he wanted to see him. The terminal manager proceeded to tell Steele that Sims said he had been speeding. Steele denied that he had been speeding and said Sims was a liar. Crump said he had only been at the terminal a short time and had not been filled in on all the rules, but Steele was terminated. Steele testified that he could not have been speeding because there were cars in back of him and in front of him and that he had no reason to speed because he had over 2 hours to drive the 55 miles from Corinth to Tupelo.

Steele had a good driving record with Respondent. At the end of each of his 3 years with Respondent he had been awarded uniform pants and shirts for safe driving. By letter dated May 1, 1979, from the safety director, he was notified that he had completed 3 years of safe driving as of March 23, 1979, and that he would receive in addition to the uniform items a shoulder patch and safety award pin.

2. Respondent's defense

Sims testified that on July 18, 1979, he and Safety Man Bill Talbert were going to patrol on Route 72 in the Corinth area.[22] They were unable to secure a motel in Corinth, so they drove south to a small motel on Route 45, The Oasis, where they secured rooms. They then started to leave the motel parking lot so as to return to their patrol on Route 72 when a Thurston truck came over a knoll toward them on a straight road about a quarter of a mile away. When the truck was first picked up on radar, it was going 67 miles per hour and it held that speed continuously until it passed the safety car. Sims gave pursuit and pulled the truck over to a safe spot about 4 miles south of the motel. The safety supervisor then performed his routine check and inspected the truck. Following the inspection, Sims returned to Route 72 and patrolled until about 2:30 or 3 a.m. The next morning Sims went to the Tupelo terminal, reported the incident to Terminal Manager Crump, and told him "to take the proper action." Sims testified that he did not see Steele at the terminal as it was about 9 a.m.

3. Conclusion

Based on the entire record I find that the General Counsel has failed to meet the burden of establishing by a preponderance of the evidence that the discharge of Steele was unlawfully motivated as the facts in Steele's discharge are vastly different from the facts in Johnson's discharge.

Steele's discharge took place almost 10 months after Holscher's outburst on the day of the election, so as to

[22] Route 72 is an east-west highway that goes to Memphis. Corinth is located at the intersection of Route 45, a north-south highway, and Route 72. It is 80 miles from Memphis. "Rand McNally Road Atlas" (1980 ed.)

present a timing element very different from the timing present in Johnson's case when the discharge took place 10 days after the threat. Sims was not in the area for an undisclosed reason, but was in the area of Corinth on a clearly enunciated business basis; that is, he was going to do routine patrol of Respondent's trucks on Route 72, a busy highway leading to Memphis, 50 miles north of the Tupelo terminal.

Also, there is no question but that Steele then knew of the 65-mile-per-hour policy in the Tupelo area and knew that exceeding 65 was a dischargeable offense. He knew this because he knew that the reason given for Johnson's discharge in November was that he had exceeded 65 miles per hour. He also knew this because, as testified to by Westmoreland, it had been announced by Operations Manager King, or Tyner, the assistant to the vice president of operations, at a meeting of the drivers held after Johnson's discharge.

Since I have found Steele not to be a credible witness, I also do not credit his testimony that he was only going 50 miles per hour when he was observed by the safety supervisor. Steele admitted that he was coming down a hill about a half mile long before he passed the Oasis. Sims put the distance at or about a quarter of a mile. In either situation, Sims had ample time to keep the radar beam on the truck so as to measure its speed and the radar gun fixed the truck's speed at 67 miles per hour. It is also to be observed that in Johnson's discharge, for some unstated reason, Sims did not clock him by radar, but merely by the patrol car's speedometer.

While it is true that Steele worked the day after he was observed by Sims, this was unlike Johnson's working the day after he was observed. On the day Johnson was observed Sims came into the terminal on the same evening, and reported his observation to the manager, so that the manager could have discharged him that evening. In Steele's case, Sims did not come to the terminal on the same evening of the observation, but went out and performed the duties for which he was in the area in the first place, patrolling highway 72. He did this until approximately 3 a.m. and then, understandably, got some sleep at the motel before going into the terminal at or about 9 a.m. to report.

One other distinguishing factor is that there is no evidence that Owner Thurston, or any executive of Respondent, communicated in any way with the terminal manager to tell him to discharge Steele as was done in Johnson's case.

Accordingly, I find and conclude that Respondent has met its burden of proving that union activity was not a motivating reason in Steele's discharge, but that he was discharged for violating Respondent's policy in the Tupelo area of exceeding 65 miles per hour, and I shall recommend the dismissal of this allegation.[23]

[23] While the complaint in Case 26-CA-7937 alleges that the discharge of Steele was also caused because he gave testimony to the Board in the form of an affidavit, this was not pursued by the General Counsel at the hearing or in his brief, and I have not considered it.

E. *Unilateral Changes*

1. The hiring of part-time employees

Westmoreland and Davis testified that in late November or early December King called a meeting of the employees and told them that business was slow. He then told them that Respondent could not pay drivers to break and load out freight at a driver's rate of pay. He then explained that Respondent could hire part-time employees to do this work at cheaper rates and that the drivers' hours would be cut by an hour a day.[24]

Baker testified that he started to work on a Monday, breaking and loading freight. He worked Tuesday and Wednesday when, at the end of his day, King called him into his office and told him that he was going to have to lay him off for a lack of work. When Baker asked what the real reason was, King replied that he could not tell him, that his orders "came from Charlotte," and that the official reason for the layoff was because there was a lack of work.

President Holscher admitted that two part-time employees had been hired and that he "might have known" that they were going to be hired prior to their employment, but he was not sure. King had told Holscher that he "needed people," and as operations manager at Tupelo he hired them. Holscher admitted on the witness stand that he had made a mistake in that the Union was not notified or consulted before the two part-time employees were hired. Early in the week in which Baker started to work, Holscher was called by union official Dan Newton, who complained about the hiring of the part-time employees. Holscher agreed with Newton that he should have contacted the Union prior to hiring the part-time employees and thereafter the two part-time employees were laid off.[25]

It is clear from Respondent's own admission that Respondent made unilateral changes in working conditions by installing the new job classification of part-time warehousemen, by changing the hours of work, and by reducing the employees' regular workweek to 35 hours per week without any notice to the employees' bargaining representative. Hence, I find that these changes were made unilaterally by Respondent and the Union in no way waived its right to negotiate thereon. Accordingly, I find that Respondent thereby violated Section 8(a)(5) and (1) of the Act. *George Webel d/b/a Webel Feed Mills & Pike Transit Company*, 217 NLRB 815 (1975).

2. The change in Christmas holiday pay

Westmoreland, who was hired in August 1977, testified that at Christmastime of 1977 the employees were paid for two Christmas holidays. In the following year, King called the employees together for a meeting, telling them he had been to Charlotte. The operations manager

[24] G.C. Exhs. 15 and 16 are Thurston "Payroll Addition" forms which show that Floyd E. Cunningham was hired on November 27 as a part-time warehouseman, and Thomas Eddie Baker was hired on December 18 in the same classification.

[25] G.C. Exhs. 8 and 10 are "Company Termination Notices" for Cunningham and Baker, which state that on December 20 these two employees were laid off "due to lack of work."

then proceeded to tell them "that Mr. Thurston had announced that they would cut us one paid holiday because [of] lack of business and they just couldn't afford it, and we'd only get paid for one holiday during Christmas instead of two." Davis, who was paid for two Christmas holidays in 1977, testified that when King was asked why the paid holidays for Christmas were being cut from 2 to 1 he replied that it was a systemwide policy.

It has long been held that Christmas bonuses which are not gratuities, and which have been paid with regularity over extended periods of time, constitute a mandatory subject of bargaining. *Gravenslund Operating Company d/b/a Washington Hardware and Furniture Co.*, 168 NLRB 513 (1967). The record as to Thurston shows that the double Christmas holiday pay was only paid in 1 year—1977. In *Nello Pistoresi and Sons, Inc. (S & D Trucking Co., Inc.)*, 203 NLRB 905 (1973), the Board held that Christmas bonuses received for 2 consecutive years were part of the wage structure and a term and condition of employment. While I agree that 2 years is an extended period of time, I am unable to find that under existing Board law 1 year constitutes such a period of time so that the double payment in 1977 became a part of the Thurston wage structure in Tupelo. I do therefore find that Respondent's discontinuance of paying for two paid Christmas holidays and only paying for one such holiday in 1978, without notice to the Union, did not amount to a violation of Section 8(a)(5) and (1) of the Act. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Thurston Motor Lines, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Highway and Local Motor Freight Employees, Local 667, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All local pickup and delivery drivers, road drivers, checkers, and dockmen employed by Respondent at its Tupelo, Mississippi, terminal, excluding all office clerical employees and supervisors as defined in the Act, constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. On October 20, 1978, a majority of the employees of Respondent in the unit described above, by secret-ballot election conducted under the supervision of the Acting Regional Director for Region 26 of the Board, in Case 26-RC-5843, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent; and on October 30, 1978, the Union was certified as the exclusive collective-bargaining representative of the employees in said unit.

5. At all times since October 20, 1978, and continuing to date, the Union has been the representative for purposes of collective bargaining of employees in the unit described above, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. Since October 30, 1978, and continuing to date, the Union has requested, and is requesting, Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective-bargaining representative of all of the employees of Respondent in the unit described above.

7. By coercively interrogating employees about their union activities, by soliciting grievances, and by threatening its employees with unspecified reprisals, Respondent interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

8. By terminating Donnie Long on September 5, 1978, and Larry W. Johnson on November 8, 1978, because of their support for the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

9. By unilaterally instituting changes in the use of part-time warehousemen and by reducing the work hours of full-time employees in the appropriate unit as set forth above, without notification to or bargaining with the Union, Respondent has engaged in conduct violative of Section 8(a)(5) and (1) of the Act.

10. Respondent has not engaged in any unfair labor practices not specifically found herein.

THE REMEDY

Having found that Respondent has committed acts in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that:

1. It cease and desist from its unfair labor practices.

2. Offer Donnie Long and Larry W. Johnson full reinstatement to their former positions or, if their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered because of Respondent's discrimination against them, from the date of discharge to the date of a proper offer of reinstatement. Their loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[26]

The Respondent, Thurston Motor Lines, Inc., its officers, agents, successors, and assigns, shall:

[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for supporting Highway and Local Motor Freight Employees, Local 667, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union.

(b) Threatening its employees that the terminal would be closed down if the Union was voted in.

(c) Threatening its employees with unspecified reprisals because they selected the Union as their collective-bargaining representative.

(d) Coercively interrogating employees concerning their union activities.

(e) Soliciting grievances and impliedly promising to remedy such grievances in order to induce employees not to support the Union; provided, however, that nothing herein requires Respondent to vary or abandon any economic benefits or any terms or conditions of employment which it has heretofore established.

(f) Unilaterally, and without notification and/or bargaining with the Union, changing hours and working conditions of its employees.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Donnie Long and Larry W. Johnson immediate and full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their lost earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Make whole any employee who has lost wages or other benefits because of the application of the unilaterally instituted change of working hours on December 18, 19, and 20.

(d) Notify and bargain with the Union as exclusive representative of the employees in the above appropriate unit with respect to changes in hours of work and part-time employees and otherwise bargain in good faith with the Union as to wages, hours, and other terms and conditions of employment.

(e) Post at its terminal in Tupelo, Mississippi, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violation of the Act not specifically found herein.

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[27] In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."